IN THE COURT OF APPEALS OF IOWA

No. 2-146 / 11-1239
Filed May 9, 2012

MARK RAY ELLIS and TOBY MICHELLE ELLIS d/b/a WILLOW CREEK WATERING HOLE and PLYMOUTH ICE CREAM COMPANY, L.L.C., An Iowa Limited Liability Company,
Plaintiffs-Appellants,

vs.

CITY OF LE MARS, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Plymouth County, Jeffrey A. Neary, Judge.

Plaintiffs appeal a district court decision granting summary judgment to defendant on plaintiffs' claims relating to breach of a lease. **AFFIRMED.**

David L. Reinschmidt and Jay E. Denne of Munger, Reinschmidt & Denne, L.L.P., Sioux City, for appellants.

John C. Gray and Deena A. Townley of Heidman Law Firm, L.L.P., Sioux City, and Joseph W. Flannery, Le Mars, for appellee.

Considered by Vaitheswaran, P.J., Mullins, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

The City of LeMars, Iowa, operates a golf course. On April 3, 2009, the City entered into a written lease and agreement (lease) with Mark and Tobi Ellis for the operation of the LeMars golf clubhouse bar facility, which was operated under the name, "Willow Creek Watering Hole."[1] The lease gave the Ellises the exclusive right to supply liquor and related food services on the site.[2] The lease was for a period from April 3, 2009 to December 31, 2009, and required a rental payment of $1000 each month.

The lease also provided:

> Both parties hereto agree to an automatic renewal of this Lease and Agreement for periods of one (1) year, subject to mutual agreement of achieving the pre-established performance targets set for the Bar Operator, as follows:
> a. 10% increase of previous year's gross sales.
> b. Conduct a minimum of five (5) special events or promotions.
> c. Establishes an excellent working relationship with Golf Pro and Banquet Manager.
> d. Eliminate and/or properly handle all patron concerns and complaints.
> e. Provide additional advertising for the Bar Facility.
>
> The City reserves the right to negotiate with any other suitable party including Bar Operator for the 2010 Lease and Service Contract at any time following October 31, 2009. Negotiations between the parties and any other suitable third party will be completed for the 2010 Lease Service Contract by December 31, 2009.

The lease provided that during the normal golf season, the clubhouse bar facility would be open "at a minimum from 11:00 a.m. to Golf Course closing

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[1] The lease was signed only by Tobi Ellis, and not by Mark Ellis. In depositions, Mark and Tobi stated they intended to both be bound by the lease.

[2] The Ellises obtained a liquor license under the name Plymouth Ice Cream Company, LLC.

seven (7) days a week." During the off-season, the clubhouse bar facility would be open "at a minimum of 24 hours per week on a regular schedule." The lease also provided, "Year to date Revenue/Expense Reports will be submitted by the Bar Operator to City Hall by October 15th of each year, so that the future years monthly rent can be calculated and based on these reports."

Later, a new lease was written which provided the Ellises would pay $1500 per month from May 15, 2009, through September 15, 2009, and then $500 per month from October 15, 2009, through December 15, 2009. None of the parties signed this lease, but the Ellises began paying under the terms of the revised lease.

On July 15, 2009, Mark and Tobi got into a verbal altercation at the Willow Creek Watering Hole, in front of patrons. Police officers were called to the scene, but left after Mark and Tobi agreed to talk civilly to each other. On August 21, 2009, Mark was arrested for domestic abuse assault at the Ellises' home. As a result, a protective order was issued prohibiting Mark from having contact with Tobi. On October 12, 2009, officers found Mark and Tobi together at the Willow Creek Watering Hole after regular operating hours. Mark was charged with violating the no contact order and providing false information to a police officer. Tobi was also charged with violating the no contact order.

The City received numerous complaints from patrons about the operation of the Willow Creek Watering Hole by the Ellises. One of the main concerns was that many times the bar was not open by 11:00 a.m., as required by the lease. Another concern was that at times they were not prepared to serve food for

lunch. Additionally, there were complaints that the beer cart was not always sent out in the afternoon. There were also complaints about other matters, such as lack of staffing and cleanliness at the bar facility.

The lease required the Ellises to submit revenue and expense reports by October 15, 2009. Although the Ellises were reminded on October 12, 2009 to turn in their financial reports, they did not turn them in on time. On October 29, 2009, the mayor met with the Ellises to collect outstanding rent. He reminded them the revenue and expense reports were overdue, and informed them the City would soon solicit proposals for the lease for 2010. On November 2, 2009, Tobi left a telephone message stating they had revenue of $167,421.75 and expenses of $91,966.73.

In an undated notice received by the Ellises on November 3, 2009, the City advised the Ellises it would open negotiations starting November 2, 2009 for the Willow Creek Watering Hole 2010 Lease and Agreement. The notice provided, "The City will not consent to an automatic renewal of your lease, due to numerous breaches with that agreement." The Ellises' attorney sent a December 17 letter to the City claiming the Ellises had met all five of the performance targets set forth in the lease, and therefore the lease should be automatically renewed. The City would not agree to automatic renewal of the lease, but reiterated that the Ellises could submit a new bid for the right to operate the Willow Creek Watering Hole. The Ellises did not submit a bid. Their lease was terminated December 31, 2009.[3]

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[3] The City leased the property to a new operator on February 18, 2010.

On January 27, 2010, the Ellises filed a petition against the City alleging the City had breached the terms of the lease. The Ellises asked for damages, specific performance, and a temporary and permanent injunction. The City responded that there was no mutual agreement that the Ellises had met the conditions for automatic renewal of the lease. On June 15, 2010, the district court denied the request for a temporary injunction.

The City filed a motion for summary judgment, claiming the lease would be renewed only if there was "mutual agreement" the Ellises met the performance targets. The City stated it did not agree the Ellises had met the performance targets, and therefore, it had no obligation to renew the lease. The Ellises resisted the motion for summary judgment.

The district court entered a ruling on May 31, 2011, granting the motion for summary judgment. The court noted the contract did not contain any provision for rent beyond 2009, and "[t]he lease does not provide a method for calculating rent in the future." The court found the automatic renewal provision was merely an agreement to agree. The court stated:

> The document requires mutual agreement as to certain performance goals, as preconditions to an automatic renewal. By its nature regarding the "mutual agreement" language, the contract contemplates further discussions before renewing the lease. The conditions precedent to the automatic renewal of the lease is not merely meeting the performance goals, but the parties' mutual agreement that the subjective performance targets have been met. The lease's requirement of mutual agreement on the achievement of performance targets demonstrates that negotiations on the renewal of the lease had not concluded.

The court concluded, "[a]s the automatic renewal of the lease was an agreement to agree and failed to provide essential terms, it is unenforceable."

The Ellises filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), claiming the court failed to address their claims that the City breached the contract by not installing a grill until July, failing to modify a facility sign, failing to provide proper snow removal, and failing to reimburse them for rent paid for January 2010. The Ellises also asserted the court failed to address their claim the City breached the covenant of good faith and fair dealing. Additionally, the Ellises claimed certain facts indicated the automatic renewal provision was enforceable. The court denied the motion. The Ellises appealed the decision of the district court.

II. Standard of Review

We review the district court's ruling on a motion for summary judgment for the correction of errors at law. *See* Iowa R. App. P. 6.907. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the non-moving party. *Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W.2d 772, 775 (Iowa 2010). In determining whether there is a genuine issue of material fact, the court affords the non-moving party every legitimate inference the record will bear. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008).

III. Alleged Breach of Automatic Renewal Provision

The Ellises contend the district court erred by finding that the automatic renewal provision was an unenforceable agreement to agree. They assert that

the automatic renewal clause was sufficiently definite to be enforceable and binding on the parties. They claim that there was a baseline rent in the lease for 2009, and that future rental payments could be adjusted from this amount, based on the revenue and expense reports.

In interpreting a lease, the goal of the court is to ascertain the meaning and intention of the parties. *Petty v. Faith Bible Christian Outreach Ctr., Inc.*, 584 N.W.2d 303, 306 (Iowa 1998). Unless the contract is ambiguous, the parties' intent will be determined from the language of the contract. *Howard v. Schildberg Constr. Co., Inc.*, 528 N.W.2d 550, 554 (Iowa 1995). When the intent of the parties is expressed in clear and unambiguous language, a court will enforce the lease as written. *Petty*, 584 N.W.2d at 306.

In considering automatic renewal terms in leases, the Iowa Supreme Court has stated, "In order to be enforceable, a provision for the extension or renewal must be definite and certain in its terms, particularly with respect to the duration of the additional term and the amount of rent to be paid." *Id*. "The terms and conditions of a renewal should be specified with such definiteness and certainty that the court may determine what has been agreed upon, and if it falls short of this requirement it is not enforceable." *Id*. (citing 51C C.J.S. *Landlord & Tenant* § 56(3) (1968)). Also, "clauses in leases containing renewal covenants leaving renewal rental for the future agreement of the parties are generally held unenforceable for indefiniteness and uncertainty." *Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Comm'n*, 464 N.W.2d 450, 453 (Iowa 1990) (quoting 1 *Williston on Contracts* § 45 (3d ed. 1977)).

Thus, an agreement to agree to enter into a contract is of no effect unless the parties have agreed upon all of the terms and conditions of the contract and nothing is left to future negotiation. *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002). To put it another way, an agreement to agree at some point in the future is not binding upon the parties. *Whalen v. Connelly*, 545 N.W.2d 284, 293 (Iowa 1996); *H & W Motor Express v. Christ*, 516 N.W.2d 912, 914 (Iowa Ct. App. 1994).

We find no error in the district court's conclusion that the automatic renewal prevision in the parties' lease is an agreement to agree, and therefore unenforceable. As the court noted, the lease does not contain any provision for the amount of future rent payments. *See Petty*, 584 N.W.2d at 306 (noting that for an automatic renewal provision to be enforceable, the amount of rent to be paid should be definite and certain within the terms of the contract). While the lease provides that the Ellises were to provide revenue and expense reports, "so that the future years monthly rent can be calculated and based on these reports," there is no provision in the lease for the method of calculating rent in future years. We determine the district court did not err in concluding that the automatic renewal provision was unenforceable because it did not provide for the amount of rent, which was an essential term of the contract. *See id*.

The district court also found that the automatic renewal provision was not enforceable because under the terms of the lease future negotiations would need to take place before the lease could be renewed. The lease specifically provides that automatic renewal was "subject to mutual agreement of achieving the pre-

established performance targets." As the court noted, "[t]he lease's requirement of mutual agreement on the achievement of performance targets demonstrates that negotiations on the renewal of the lease had not concluded." Whether the performance targets had been met was to be the subject of future discussion and negotiation between the parties based on the Ellises' performance during the lease term. We conclude the district court did not err in concluding the automatic renewal provision was a mere agreement to agree at some point in the future. As such, the provision was unenforceable. *See Air Host Cedar Rapids*, 464 N.W.2d at 453 (noting an enforceable contract is not created where the parties agree to a contract on a basis to be settled in the future).

The Ellises also claim that there are genuine issues of material fact as to whether they met the performance standards set forth in the lease agreement. However, because we have determined the automatic renewal provision of the lease agreement was not enforceable as it was a mere agreement to agree, summary judgment is appropriate even if the Ellises have raised certain factual issues.

Furthermore, we note that some of the performance targets are subjective.[4] A review of the exhibits submitted with the motion for summary judgment shows the City had reasonable grounds for concluding the Ellises had not met some of those performance targets, and thus had not agreed to an

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[4] The lease requires the Ellises to establish an excellent working relationship with the golf pro and banquet manager, and eliminate and/or properly handle all patron concerns and complaints. Whether the Ellises met these performance standards would be a subjective determination.

automatic renewal of the lease.[5] We also note the Ellises were given the opportunity to bid, along with other parties, to operate the Willow Creek Watering Hole during 2010, but they did not take advantage of that opportunity, declining to submit a bid.

IV. Alleged Breach of Duty of Good Faith & Fair Dealing

In the alternative, the Ellises contend that even if the automatic renewal provision is an unenforceable agreement to agree, "it is undisputed that the parties clearly contemplated that there would be discussions between the parties about a continuing relationship between the parties after 2009 upon certain conditions being met." They contend that therefore at the very least the City was obligated to negotiate with them in good faith regarding renewal of the contract, and evidence in the record would allow a fact finder to determine the City did not deal with them in good faith. The Ellises argue that the court did not address this issue, and suggest the case should be remanded for trial on the issue.

The Ellises' petition does not express a claim that the City failed to negotiate regarding renewal. However, "[i]t is generally recognized that there is an implied covenant of good faith and fair dealing in a contract." *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 684 n.4 (Iowa 2001). The Ellises raised the issue of an alleged breach of a duty of good faith and fair dealing in their brief in support of their resistance to the City's motion for summary judgment. When the district court's summary judgment ruling did not expressly address the issue, the

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[5] Additionally, even if the Ellises had met these five performance targets there was evidence that they had violated other terms of the lease agreement, such as the requirements that they open the bar at 11:00 a.m. every day and provide revenue and expense reports by October 15, 2009.

Ellises pursued the matter by way of a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), pointing out that the court had not addressed the claim and arguing that the evidence established a genuine issue of material fact as to whether the City had dealt with them in good faith about extending the lease beyond 2009.

Where, as here, summary judgment is rendered on the entire case, rule 1.904(2) applies. Iowa R. Civ. P. 1.981(3). "[A rule 1.904(2)] motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication." *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984). "The purpose of a rule [1.904(2)] motion is to advise counsel and the appellate court of the basis of the trial court's decision in order that counsel may direct [counsel's] attack upon specific adverse findings or rulings in the event of an appeal." *Iowa Waste Sys., Inc., v. Buchanan Cnty.*, 617 N.W.2d 23, 33 (Iowa Ct. App. 2000) (citation omitted). One fundamental purpose of the rule is thus to preserve error on an issue the district court did not address in a ruling. Where, as here, the district court generally overrules the motion without addressing its specifics, error is preserved. We thus proceed to the merits of the issue.

The essence of the Ellises' claim of error on this issue is that there exists a genuine issue of material fact on the question of whether the City failed to negotiate with them in good faith about extending the lease beyond 2009. Certain evidence is undisputed. On October 29, 2009, the City informed the Ellises the City would not agree to "automatic renewal" of the lease and would

soon solicit bids for 2010. Nothing in the record indicates the City then or later told the Ellises, or suggested to them, that it would not consider renewing their lease. In the undated notice received by the Ellises on November 3, 2009, the City advised the Ellises it would open negotiations on November 2, 2009. Following receipt of the Ellises' attorney's December 17 letter, the City reiterated its willingness to consider a bid from the Ellises. The Ellises never submitted a bid. The City did not enter a lease with a new operator until February 18, 2010.

In summary, despite the City's expressed willingness to consider a bid from the Ellises, the Ellises failed or refused to enter into negotiations for a renewal of the lease, holding entirely to their position they were entitled to automatic renewal. Under such circumstances, any failure to negotiate in good faith for a renewal of the lease beyond 2009 must rest entirely at the feet of the Ellises. We find no basis for the district court to have found the existence of a genuine issue of material fact on this issue, and thus find no error in its grant of summary judgment.

V. Other Alleged Breaches of Contract

The Ellises assert the district court erred by failing to grant them relief on their claims the City breached provisions of the lease agreement other than the automatic renewal provision. They claim: (1) the City failed to install a grill and exhaust fan by May; (2) the City failed to modify a main facility sign; (3) the City failed to provide proper snow removal; and (4) the City failed to return a rent payment for January 2010. The Ellises claim they are entitled to relief because the City breached these terms of the lease agreement.

None of these issues were raised in the Ellises' resistance to the motion for summary judgment, as the Ellises' resistance was based on their claim that they had met the five performance targets set forth in the lease and an assertion the City had breached a duty of good faith and fair dealing. In its ruling granting the motion for summary judgment the district court did not address or rule on these issues not raised in the Ellises answer or resistance. The issues were subsequently raised in the Ellises' motion pursuant to rule 1.904(2). Because the issues were not raised prior to the court's ruling on the motion for summary judgment, we conclude they have not been preserved for appeal. *See Osborne v. Iowa Natural Res*. *Council*, 336 N.W.2d 745, 747-48 (Iowa 1983) (noting issues would not be considered on appeal that had not been raised in some manner prior to a final ruling by the district court).

We affirm the decision of the district court granting summary judgment to the City on the Ellises' claims for breach of contract.

AFFIRMED.